SUPREME COURT, U.S.
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No. 06-1168

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IN THE

Supreme Court of the United States

BUFFALO TEACHERS FEDERATION, BUFFALO EDUCATIONAL SUPPORT TEAM, NEA/NY, TRANSPORTATION AIDES OF BUFFALO, NEA/NY, SUBSTITUTES UNITED BUFFALO NEA/NY, BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS, AFSCME LOCAL 264, PROFESSIONAL CLERICAL AND TECHNICAL EMPLOYEES' ASSOCIATION,

Petitioners,

v.

RICHARD TOBE, THOMAS E. BAKER, ALAIR TOWNSEND, H. CARL MCCALL, JOHN J. FASO, JOEL A. GIAMBRA, MAYOR ANTHONY MASIELLO, RICHARD A. STENHOUSE, ROGER G. WILMERS, in their official capacities as directors/members of the Buffalo Fiscal Stability Authority,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In order to pass muster under the Contract Clause of the United States Constitution, state legislative action impairing contractual financial obligations must be "reasonable and necessary" to serve an important public purpose. In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23-29 & n.27 (1977), this Court ruled that in cases challenging state legislative action impairing *the State's own* contractual financial obligations, the standard of judicial review to be applied in determining the reasonableness and necessity of the impairment is "careful scrutiny." This, the Court noted, is in contrast to cases challenging state legislative action impairing *private* contractual financial obligations, in which the qualitatively less exacting "deference to [the] legislat[ure]" standard of judicial review set forth in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), applies. *See* 431 U.S. at 21-23, 26. The questions presented by this certiorari petition are:

1. Whether the standard of judicial review that applies in determining the reasonableness and necessity of state legislative action impairing *a state political subdivision's* contractual financial obligations is the *United States Trust* "careful scrutiny" standard that the Ninth Circuit applied in *Continental Illinois National Bank v. Washington*, 696 F.2d 692 (9th Cir. 1983), or the "deference to [the] legislat[ure]" standard derived from *Blaisdell* that the Second Circuit applied in this case.

2. If the *United States Trust* "careful scrutiny" standard of judicial review applies in determining the reasonableness and necessity of state legislative action impairing a state political subdivision's contractual financial obligations, whether under that standard the State of New York legislative action at issue in this case—which impairs the contractual financial obligations of the City of Buffalo and the City of Buffalo School District—violates the Contract Clause.

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

In addition to the parties listed in the caption, Local 409 International Union of Operating Engineers was a party in the court below. Petitioner Buffalo Teachers Federation is an incorporated association of individual union members; it has no parent corporation and has issued no stock. The remaining Petitioners are unincorporated associations of individual union members.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	23
APPENDIX A	1a
APPENDIX B	22a
APPENDIX C	55a
APPENDIX D	57a

TABLE OF AUTHORITIES

CASES — Page

AFSCME Local 264, et al. v. Tobe, et al., No. 04-753 (W.D.N.Y.) 4
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 18
Association of Surrogates & Supreme Court Reporters v. State of New York, 940 F.2d 766 (2d Cir. 1991) 5, 8-9, 21
Baltimore Teachers Union, Am. Fed'n of Teachers Local 340 v. Mayor & City Council of Baltimore, 6 F.3d 1012 (4th Cir. 1993) 22
CSEA, Inc. Local 1000, et al. v. Buffalo Fiscal Stability Auth., et al., No. 04-853 (W.D.N.Y.) .. 4
Condell v. Bress, 983 F.2d 415 (2d Cir. 1993) 5, 21
Continental Illinois National Bank v. Washington, 696 F.2d 692 (9th Cir. 1983) ..... *passim*
Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 8
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 23
Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942) 15
Ferguson v. Skrupa, 372 U.S. 726 (1963) 8
Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) ..... *passim*
Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618 (1st Cir. 1981) .. 7, 17-18
Lochner v. New York, 198 U.S. 45 (1905) 8
Louisiana ex rel. Hubert v. New Orleans, 215 U.S. 170 (1909) 13
Nevada Employees Ass'n, Inc. v. Keating, 903 F.2d 1223 (9th Cir. 1990) 23
Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46 (2d Cir. 1998) 7

TABLE OF AUTHORITIES—Continued

Page

Sonoma County Organization of Public Employees v. County of Sonoma, 591 P.2d 1 (Cal. 1979) 10, 14-15
Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) 23
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) ..... *passim*
University of Haw. Prof'l Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999) 23
Wolff v. New Orleans, 103 U.S. 358 (1880) 13

CONSTITUTIONS

U.S. Const. art. I, § 10 2

STATUTES

28 U.S.C. § 1254 2
28 U.S.C. § 1331 5
N.Y. Pub. Auth. Law Art. 10-D, Title 2 § 3850-a... 3

MISCELLANEOUS

Lawrence H. Tribe, *Constitutional Choices* (1985) 18

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PETITION FOR A WRIT OF CERTIORARI

The seven public employee labor unions listed in the caption petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to enable this Court to review the judgment and decision in *Buffalo Teachers Federation, et al. v. Tobe, et al.*, 2d Cir. No. 05-4744.

OPINIONS BELOW

The decision of the Second Circuit is reported at 464 F.3d 362, and is reproduced as Appendix A hereto. (Pet. App. 1a-21a). The decision of the United States District Court for the Western District of New York is reported at 446 F. Supp. 2d 134, and is reproduced as Appendix B hereto. (Pet. App. 22a-54a).

JURISDICTION

The Second Circuit issued its judgment and decision on September 21, 2006. Petitioners filed a timely petition for panel rehearing or rehearing *en banc*, which was denied by the Second Circuit on November 27, 2006. (Pet. App. 55a-56a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10 of the United States Constitution provides, in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

The relevant provisions of the Buffalo Fiscal Stability Authority Act, N.Y. Pub. Auth. Law Art. 10-D, Title 2, as amended and codified in 42 McKinney's Consolidated Laws of New York, are reproduced in Appendix D hereto (Pet. App. 57a-72a).

STATEMENT OF THE CASE

For several years prior to 2003, the City of Buffalo—a political subdivision of the State of New York that partially finances the City of Buffalo School District, itself a political subdivision of the State—experienced "declining financial health." Pet. App. 2a. In an effort to enable the City of Buffalo to balance its budget and remain fiscally stable, the State increased its annual appropriations of state aid to the

City, so that "state aid grew from $67 million in 1997-98 to $128 million in 2002-03." *Id.* 3a.

To arrest this trend in what the State Legislature described as "extraordinary increases in state aid" to the City of Buffalo, the State, in June 2003, enacted the Buffalo Fiscal Stability Authority Act, N.Y. Pub. Auth. Law Art. 10-D, Title 2 ("BFSA Act"). Section 3850-a of the Act, which is titled "Legislative declaration of need for state intervention," sets forth the Act's purposes as follows:

> The legislature hereby finds and declares that the city of Buffalo is facing a severe fiscal crisis, and that the crisis cannot be resolved absent assistance from the state. The legislature finds that the city has repeatedly relied on annual extraordinary increases in state aid to balance its budget, and that the state cannot continue to take such extraordinary actions on the city's behalf. The legislature further finds and declares that maintenance of a balanced budget by the city of Buffalo is a matter of overriding state concern, requiring the legislature to intervene to provide a means whereby: the long-term fiscal stability of the city will be assured, the confidence of investors in the city's bonds and notes is preserved, and the economy of both the region and the state as a whole is protected. [Pet. App. 59a-60a.]

In short, the State of New York's declared purposes in enacting the BFSA Act were to continue to provide assistance to the City of Buffalo sufficient to enable the City "to balance its budget," while avoiding or limiting the "annual extraordinary increases in state aid" that previously had been required to achieve that state objective. As Respondents put it in their opening summary judgment brief in this case, "the important purposes of the [BFSA] Act" were "to avert

Buffalo's fiscal crisis and avoid further state expenditures" in so doing.[1]

To achieve these declared purposes, the BFSA Act creates a fiscal control board for the City of Buffalo ("Control Board") as "a corporate governmental agency and instrumentality of the state constituting a public benefit corporation," Pet. App. 65a, and delegates various state legislative powers to the Control Board. Among those delegated state legislative powers is the power to impair existing collective bargaining contracts between the City of Buffalo and the unions representing its employees—and the City of Buffalo School District and the unions representing its employees—by eliminating scheduled wage increases provided for in those contracts ("wage freeze legislative power"). *See id.* 27a-28a; 67a-68a.

On April 21, 2004, the Control Board exercised its delegated wage freeze legislative power "to the full extent authorized by the [BFSA] Act," Pet. App. 29a, thereby "eliminating contractual salary increases that [Petitioners] had negotiated with the city of Buffalo school district," *id.* 23a; *see also id.* 5a (the Control Board's action "effectively prohibited members of the plaintiff unions from enjoying a two percent wage increase that the unions had negotiated as part of their labor contracts with the City").[2]

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[1] Memorandum of Law in Support of Motion for Summary Judgment of the BFSA Defendants, at 21.

[2] The Control Board's action also had the effect of eliminating contractual salary increases that unions representing certain City of Buffalo employees had negotiated with the City. The Control Board's action in that regard has spawned two other federal court lawsuits raising Contract Clause claims that remain pending at the trial court level. *See AFSCME Local 264, et al. v. Tobe, et al.*, No. 04-753 (W.D.N.Y.); *CSEA, Inc. Local 1000, et al. v. Buffalo Fiscal Stability Auth., et al.*, No. 04-853 (W.D.N.Y.).

Petitioners brought suit in the United States District Court for the Western District of Buffalo on behalf of the school district employees they represent, alleging that the Control Board, in exercising its delegated wage freeze legislative power to eliminate salary increases to which the employees were contractually entitled, had violated the Constitution's Contract Clause.[3] The basis for federal jurisdiction in the District Court was 28 U.S.C. § 1331.

Petitioners rested their Contract Clause claim on two Second Circuit decisions—*Association of Surrogates & Supreme Court Reporters v. State of New York*, 940 F.2d 766 (2d Cir. 1991) ("*Surrogates*") and *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993) ("*Condell*"). Those cases involved Contract Clause challenges to New York legislative action impairing the State's own contractual financial obligations by delaying or "lagging" scheduled wage payments provided for in the labor contracts covering certain State employees. Applying this Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *Surrogates* and *Condell* held that the reasonableness and necessity of such "self-serving" state contract impairment legislation is subject to "especially vigilant" judicial scrutiny, and can be upheld under the Contract Clause only if it is necessitated by a state fiscal crisis that precludes the State from achieving its public policy objectives through other means. *Surrogates*, 940 F.2d at 771, 773-74; *Condell*, 983 F.2d at 419-20.

Contending that the state legislation delegating to the Control Board the power to impair *a state political subdivision's* contractual financial obligations is no less in "the State's self-interest," *United States Trust*, 431 U.S. at 26, than is state legislation impairing the State's own contractual financial obligations, Petitioners argued that the "especially vigilant"

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[3] Petitioners also asserted a Takings Clause claim, which they did not prevail on, and which they do not seek to raise here.

judicial scrutiny standard that *Surrogates/Condell* had drawn from *United States Trust* should be applied in this case.

On cross-motions for summary judgment, the District Court ruled against Petitioners and in favor of Respondents on Petitioners' Contract Clause claim. As a threshold matter, the District Court agreed with Petitioners "that the permanent cancellation of [their members'] 2% annual salary increases is an impairment of contract that is substantial." Pet. App. 36a. But the District Court rejected Petitioners' argument that the *Surrogates/Condell* "especially vigilant" judicial scrutiny standard should be applied to the state contract impairment legislative action at issue, reasoning that that standard applies only when a State impairs its own contractual financial obligations. *Id.* 44a, 46a, 48a-49a. "[T]his case," the District Court opined,

> presents circumstances closer to the impairment of a private contract than to self-serving impairment of a public contract. The State is impairing a contract that it is not a party to, yet the contract is a public contract. Accordingly, this Court will not completely defer to the state legislature's determinations, but will afford the legislature more than "some" deference. [*Id.* 47a].[4]

On appeal, the Second Circuit affirmed the District Court's Contract Clause ruling. Like the District Court, the court below found that "the wage freeze substantially impairs the unions' labor contracts with [the City of] Buffalo [School District]." Pet. App. 8a. And, like the District Court, the Second Circuit refused to apply the *Surrogates/Condell*

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[4] *See also* Pet. App. 49a ("Under the circumstances presented here, where the state is validly exercising its police power [instead of impairing its own financial contractual obligations], the level of searching scrutiny performed in *Surrogates* and *Condell* does not apply. Rather, this Court affords considerable deference (less than complete deference, but greater than some deference) to the state's decision that a wage freeze is necessary to achieve the goals of the BFSA [Act].").

"especially vigilant" judicial scrutiny standard drawn from *United States Trust* in determining the reasonableness and necessity of that impairment of a state political subdivision's contracts. To the contrary, the Second Circuit instead applied a qualitatively less rigorous "deference to [the] legislat[ure]" standard of judicial review derived from *Blaisdell* for determining the constitutionality of private contract impairment legislation. And, on the basis of that deferential standard, the Second Circuit held—for much the same reasons given by this Court in *Blaisdell*—that the state contract impairment legislative action here passed constitutional muster:

> [O]n the undisputed facts of this case, we find no need to second-guess the wisdom of picking the wage freeze [contract impairment] over other policy alternatives . . . . *See Blaisdell*, 290 U.S. at 447-48 ("Whether the [contract impairment] legislation is wise or unwise as a matter of policy is a question with which we are not concerned."); *Local Div. 589* [, *Amalgamated Transit Union v. Massachusetts,* 666 F.2d [618,] 643 [(1st Cir. 1981) (Breyer, J.)] (noting that the court could have balanced alternatives to impairment, but concluding that "[a]nswering these sorts of questions . . . is a task far better suited to legislators than to judges"); *see also Sal Tinnerello & Sons* [, *Inc. v. Town of Stonington*], 141 F.3d [46,] 54 [(2d Cir. 1998)] ("[I]t is not the province of this Court to substitute its judgment for that of . . . a legislative body.").
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> * * * *
>
> Our holding can be summarized simply: An emergency exists in Buffalo that furnishes a proper occasion for the state . . . to impose a wage freeze [contract impairment] to "protect the vital interests of the community," and the existence of the emergency "cannot be regarded as a subterfuge or as lacking in adequate basis." *Blaisdell*, 290 U.S. at 444. Nor can the wage freeze be regarded as unreasonable or unnecessary to achieve the important

public purpose of stabilizing Buffalo's fiscal position. [Pet App. 15a, 17a.]

Although the Second Circuit at an earlier point in its opinion asserted that it would accord "less deferen[ce] to the state's assessment of reasonableness and necessity" in a situation involving a State's impairment of its political subdivision's contracts than "in a situation involving [the impairment of] *purely* private contracts," Pet. App. 12a (emphasis added), the basis on which the court below upheld the constitutionality of the contract impairment legislative action in this case belies that assertion. As the above-quoted passages show, what the Second Circuit in fact did was accord "the state's assessment of reasonableness and necessity" the kind of "deferen[ce]" that is appropriate under *Blaisdell* when a state impairment of private contracts is at issue.

In its opinion, the Second Circuit explained its basis for refusing to apply the *Surrogates/Condell* "especially vigilant" judicial scrutiny standard drawn from *United States Trust* in the circumstances of this case—an explanation that amply confirms that what the court below did was accord "the state's assessment of reasonableness and necessity" the kind of "deferen[ce]" called for by *Blaisdell*. As the court put it, applying such an "exacting" standard of judicial review here "would harken a dangerous return to the days of *Lochner v. New York*, 198 U.S. 45 (1905), *overruled, see Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), in which courts would act as superlegislatures, overturning laws as unconstitutional when they 'believe[d] the legislature [ ] acted unwisely,' *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)." Pet. App. 12a; *compare Surrogates*, 940 F.2d at 773 (rejecting New York's argument that engaging in the "especially vigilant" judicial scrutiny called for by *United States Trust* in situations involving state legislative action impairing the

State's own contracts would improperly cast the court in the role of "a 'superlegislature'").

REASONS FOR GRANTING THE WRIT

I.

The critical—and almost invariably the outcome-determinative—threshold question in cases challenging state legislative action impairing contractual financial obligations is the standard of judicial review to be applied in determining the "reasonableness and necessity" of the impairment. This Court's Contract Clause decisions establish two clear principles. The first—set forth in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)—is that the reasonableness and necessity of state legislative action impairing *the State's own* contractual financial obligations is to be determined by applying a "careful scrutiny" standard of judicial review. The second—which derives from *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)—is that the reasonableness and necessity of state legislative action impairing *private* contractual financial obligations is to be determined by applying a qualitatively less exacting "deference to [the] legisla[ture]" standard of judicial review. Against this background, the courts of appeals are of different minds as to the standard of judicial review that is to be applied in determining the reasonableness and necessity of state legislative action impairing *a state political subdivision's* contractual financial obligations.

In *Continental Illinois National Bank v. Washington*, 696 F.2d 692 (9th Cir. 1983), the Ninth Circuit ruled that the constitutionality of state legislative action impairing state political subdivision contractual financial obligations—like that of state legislative action impairing a State's own contractual financial obligations—is to be determined through the *United States Trust* "careful scrutiny" standard of judicial review. Indeed, the Ninth Circuit—following the lead of

the California Supreme Court's earlier decision in *Sonoma County Organization of Public Employees v. County of Sonoma*, 591 P.2d 1 (Cal. 1979)—read this Court's *United States Trust* decision to call for that conclusion.

In contrast, the Second Circuit in the instant case upheld the constitutionality of the state legislative action impairing state political subdivision contractual financial obligations at issue here by applying a "deference to [the] legislat[ure]" standard of judicial review of the kind set forth in *Blaisdell* for determining the constitutionality of private contract impairment legislation. In declining to apply the *United States Trust* "careful scrutiny" standard of judicial review, the court below explained that application of such an exacting standard would require the court "to second-guess the wisdom of picking the wage freeze [contract impairment] over other policy alternatives," Pet. App. 15a, and thereby "harken a dangerous return to the days of *Lochner v. New York*," *id.* 12a.

Thus, the courts of appeals are now divided on a fundamental Contract Clause legal question of substantial doctrinal and practical significance: the proper standard of judicial review for determining the constitutionality of state legislative action impairing state political subdivision contractual financial obligations.

As we demonstrate below, the Ninth Circuit's *Continental Illinois National Bank* decision on this question is right, and reflects a correct reading of *United States Trust*. And, of equal moment, the conflicting Second Circuit decision in the instant case is wrong, and is irreconcilable with the reasoning of *United States Trust*. Most critically to the point, the Second Circuit's decision throws open a welcoming door to self-interested state legislative action impairing state political subdivision contractual financial obligations. By so doing, the Second Circuit decision erases the Contract Clause's core protection against improper state impairment of the literally hundreds of thousands of contracts between the myriad of

state political subdivisions and their employees, bond holders, contractors and vendors.

This Court therefore should grant review to settle the fundamental Contract Clause question presented by this certiorari petition, and to reverse the erroneous Second Circuit decision in this case.

(A) *United States Trust* upheld a Contract Clause challenge to New Jersey legislation repealing a security covenant protecting holders of New York/New Jersey Port Authority bonds. The Court subjected that state legislative action impairing the State's own contractual financial obligations to a "careful scrutiny" of the "reasonableness [of] and the necessity [for] [the impairment]" standard of judicial review, *see* 431 U.S. at 23-29 & n.27, and concluded, on the basis of that review, that the state legislative action violated the Contract Clause, *id.* at 29-32.

The *United States Trust* Court—recognizing what it termed a "dual standard of review" for determining the constitutionality of state legislative action impairing state contractual financial obligations on the one hand and state legislative action impairing private contractual financial obligations on the other, 431 U.S. at 26 n.25—explained as follows the rationale for applying a "careful scrutiny" standard of judicial review to the former:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard [to such laws impairing state contracts], however, complete deference to a legislative assessment of reasonableness and necessity [the *Blaisdell* standard of judicial review for laws impairing private contracts] is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes

> do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. [*Id.* at 25-26.]

Thus, under the *United States Trust* standard of judicial review for determining the constitutionality of state legislative action impairing state contracts:

> [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain [state legislative action impairing state contracts] if that impairment was both reasonable and necessary to serve [whatever] admittedly important purposes [are] claimed by the State. [431 U.S. at 29.]

The Court then fleshed out the foregoing by stating that "[t]he determination of necessity" has "two levels." First, was the impairment "essential" to accomplish the "important purposes claimed by the State." 431 U.S. at 29-30. And, second, because "the State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives," did the State have "alternate means [apart from contract impairment] of achieving" the State's purposes. *Id.* at 30-31.[5]

(B) The *Continental Illinois National Bank* case presented a Contract Clause challenge to state initiative legislation imposing on the Washington Public Power Supply System

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[5] The Court added that the determination of "reasonableness" focuses on whether the contract impairment is either "a reasonable means to restrict a party to those gains reasonably to be expected from the contract," or a reasonable means to meet unknown and unforeseen changes in circumstances that cause the contract "to have a substantially different [current] impact . . . than when it was adopted." 431 U.S. at 31-32 (internal quotations omitted).

("WPPSS")—a "municipal corporation of the State . . . comprised of 19 public utility districts and 4 municipalities," 696 F.2d at 694—a "substantial new hurdle to the sale of bonds [by WPPSS] essential to" WPPSS's performance of contracts to build and operate three nuclear power plants, *id.* at 697. In upholding that challenge, the Ninth Circuit read *United States Trust* to mean that the constitutionality of such state legislative action impairing state political subdivision contractual financial obligations—in common with that of state legislative action impairing the State's own contractual financial obligations—is to be determined through *United States Trust*'s "careful scrutiny" of the impairment's "reasonableness and necessity" standard of judicial review.

In this regard, the Ninth Circuit began by explaining:

> Defendants . . . argue that a municipal corporation, such as WPPSS, remains subject to state regulation and cannot be allowed to contract itself out from state control. That argument misperceives the nature of the restriction on state action imposed by the contract clause. As a creature of the state a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate [through initiative legislation]) is not free to alter the corporation's ability to perform. *Louisiana ex rel. Hubert v. New Orleans*, 215 U.S. 170, 175-78 (1909); *Wolff v. New Orleans*, 103 U.S. 358, 365-68 (1880); *see United States Trust*, 431 U.S. at 24 n.22. WPPSS remains subject to state regulation, but if the State significantly alters WPPSS's ability to perform previously negotiated agreements, it impairs obligations of contract. [696 F.2d at 699-700 (internal citations omitted).]

On that predicate, the Ninth Circuit held:

> [Because the state legislative action at issue] does impair WPPSS's contractual obligations, we must determine whether the degree of that impairment is both reasonable and necessary to achieve a valid state interest. *United States Trust*, *supra*, 431 U.S. at 29. Our determination whether the State's action is justified is affected by the fact that WPPSS is itself a political subdivision of the State, made up of other political subdivisions. We cannot view the contracts between WPPSS and the plaintiffs as those between private parties. Because the State is a contracting party, we give less deference to its claims of justification for impairment. *Id.* at 25-26. [696 F.2d at 701 (internal citations omitted).]

The Ninth Circuit then subjected the three "related [public purpose] goals" that were "offered in justification" for the state contract impairment legislative action to *United States Trust* "careful scrutiny." Citing and following *United States Trust* at every turn, that court found each of those justifications wanting. 696 F.2d at 701-02.[6]

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[6] The Ninth Circuit's decision on the proper standard of judicial review for such legislative action follows the lead of the California Supreme Court's decision in *Sonoma County Organization of Public Employees v. County of Sonoma, supra.* In that decision, the California Court, after canvassing this Court's Contract Clause jurisprudence, deemed it appropriate to apply the "standards" of judicial review set forth in *United States Trust* in determining the constitutionality of the state legislative action at issue impairing the wage contracts of the State's political subdivisions. 591 P.2d at 7. The California Court did so after first summarizing *United States Trust* and its "standards" of review as follows:

> In [*United States Trust*], as here, the government attempted to impair not obligations entered into between private parties, but the obligations of the public entity itself. . . .
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> . . . .
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> The court . . . held that in determining whether such [an impairment] is justified, complete deference to a legislative assessment of rea-

(C) 1. The Ninth Circuit's reading of *United States Trust* is correct. In the first place, the *United States Trust* Court rested its decision on the long line of its Contract Clause precedents subjecting to exacting review, and holding unconstitutional, "[s]tate laws authorizing the impairment of *municipal bond contracts*." *United States Trust*, 431 U.S. at 24 n.22 (emphasis added); *see also id.* at 26-28 (treating with these prior "municipal bond cases," and distinguishing *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942), which represents "[t]he only time in this century that [a State's] alteration of a municipal bond contract has been sustained by this Court").

Beyond that, this Court's reasoning in *United States Trust* calls for the conclusion that the "careful scrutiny" standard of judicial review should apply equally to state legislative action impairing the contractual financial obligations of the State itself and of its political subdivisions. That exacting standard of judicial review reflects the particular importance of an independent check on state contract impairment legislative action where "the State's self-interest is at stake" if "the

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sonableness and necessity is not required because the government's self-interest is at stake. It stated [both that] . . . '[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors . . . [and that] [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. . . .' (431 U.S. at pp. 26, 29, 30-31). [591 P.2d at 6-7.]

Against that background, the California Court made its own judicial "assess[ment]" of, and found wanting, the State's "emergency justifi[cation for the state legislative] limitation of [contractual] wage increases to local government employees," relying in particular on "the admonition in *United States Trust Company* that complete deference to a legislative assessment of reasonableness and necessity is not required where, as here, government is attempting to modify governmental financial obligations." 591 P.2d at 8.

Contract Clause [is to] provide [any] protection at all." 431 U.S. at 26. And, precisely because state political subdivisions are governmental bodies subordinate to the State that are formed, structured, and partially financed by the State, the States have the same "self-interested" political and financial incentives to take legislative action to impair their political subdivisions' contractual financial obligations as to impair their own contractual financial obligations—as this Court has recognized in its Contract Clause municipal bond cases.

Indeed, the state contract impairment legislative actions at issue in *Continental Illinois National Bank* and in the instant case were just as certainly directed at protecting and improving the impairing State's financial position as any legislative action impairing a State's own contractual financial obligations. As the Ninth Circuit noted in *Continental Illinois National Bank*, the defendants there

> attempted to justify the [impairment legislative action at issue] in part . . . [as] protecting the marketability of state-issued bonds . . . . [B]ut the contract clause was intended to ensure that the State pursues that purpose in an evenhanded manner. . . . The State's argument emphasizes the fact that the State is attempting to protect its fund-raising power by limiting [its political subdivision's] obligation to finance its projects. *See United States Trust*, 431 U.S. at 26. [696 F.2d at 701 n.12.]

See also id. at 702 ("[The state contract impairment legislative action here] sacrifices the interest of parties to contracts with the State's subdivision *in order to protect the State's own finances*.") (emphasis added).

So too in the instant case. As the Respondents themselves have put it, "the important purposes of the [BFSA] Act"—and its provision for the impairment of state political subdivision contracts—were "to avert Buffalo's fiscal crisis *and avoid further state expenditures*" in so doing. *Supra* pp. 3-4 (emphasis added).

2. In contrast to the Ninth Circuit's *Continental Illinois National Bank* decision, the Second Circuit refused to apply the more exacting "careful scrutiny" standard of judicial review of *United States Trust* to the state legislative action impairing a state political subdivision's contractual financial obligations at issue in this case, and instead applied a qualitatively less exacting "deference to the legislat[ure]" standard of judicial review derived from *Blaisdell* for determining the constitutionality of state legislative action impairing private contractual financial obligations. *Supra* pp. 6-9.

The Second Circuit rationale for this refusal was that applying the more exacting standard would require the court "to second-guess the wisdom of picking the wage freeze [contract impairment] over other policy alternatives," Pet. App. 15a, and thereby "harken a dangerous return to the days of *Lochner v. New York*," *id.* 12a. But that is *not* an objection that provides a basis for applying a different, less exacting, standard of judicial review to state legislative action impairing state political subdivision contractual financial obligations than to state legislative action impairing the State's own contractual financial obligations. It is, rather, an across-the-board objection in principle to the *United States Trust* "careful scrutiny" standard of judicial review as such, and to the application of that standard in determining the constitutionality of *any* contract impairment legislative action of *any* kind. Thus, it is not an effort to understand and to apply this Court's Contract Clause jurisprudence to the instant case, but rather a considered refusal to do so.

Nor do the authorities relied on by the Second Circuit to support its refusal to apply the *United States Trust* "careful scrutiny" standard of judicial review here, *see* Pet. App. at 12a-13a, 15a, support that refusal in the slightest. In contrast to the contract impairment legislation here, the legislation in *Local Div. 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981) (Breyer, J.), did *not*

operate to relieve the State or its political subdivisions of their contractual *financial* obligations; rather, the legislation there operated to modify the interest arbitration procedures of the public contract in question. *See id.* at 620-23, 640. Principally for that reason, the First Circuit held that the state legislation at issue was subject to a more deferential standard of judicial review than this Court had held was appropriate in *United States Trust*. *See id.* at 642 ("More importantly, *United States Trust* limits its stricter 'review' approach to state laws in the 'financial' area—laws which impair a state's 'financial obligations.'").

The Second Circuit's reliance on Lawrence H. Tribe, *Constitutional Choices* 182 (1985), is equally misplaced. The view expressed by Professor Tribe is that this Court's Contract Clause decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), "could [be seen to] represent a back-door return to the jurisprudence of *Lochner*." But that Tribe critique of *Allied Structural Steel* is wholly beside the point here, inasmuch as *Allied Structural Steel* involved state legislative action impairing *private* contractual financial obligations. Indeed, the Second Circuit's misplaced reliance on that Tribe critique is mirrored by its repeated citation to *Blaisdell*—another *private* contract impairment case—to support the standard of judicial review that it applied here to state legislative action impairing *a state political subdivision's* contractual financial obligations.

The Second Circuit's error in this regard is foreshadowed by, and predicated on, its view that the constitutionality of state legislative action impairing a state political subdivision's contractual financial obligations turns on the *factual* issue of "whether the contract-impairing law is self-serving," Pet. App. 11, in the sense that "the [S]tate's self-interest . . . motivated the [S]tate's conduct," *id.* 2a; a factual issue, the court opined, as to which plaintiffs asserting a Contract Clause claim bear "the burden of proof," *id.* The critical

point that this Second Circuit analysis misses is that state legislative action impairing a state political subdivision's contractual financial obligations—like state legislative action impairing a State's own contractual financial obligations—is by its nature inherently legislative action in the impairing State's "self-interest." *Supra* pp. 15-16. Thus, while the Second Circuit does not in terms rule out the application of a more exacting standard of judicial review for some hypothetical, "self-interest . . . motivated" state legislative action impairing a state political subdivision's contractual financial obligations, Pet. App. 2a, lest the court thereby "open . . . an end-run around Contracts Clause law" by the States, *id.* 11a, that is *precisely* the deleterious result of the Second Circuit's refusal to recognize—as did the Ninth Circuit—that the *United States Trust* "careful scrutiny" standard of judicial review applies equally to state legislative action impairing the contractual financial obligations of the State itself and of its political subdivisions.

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The short of the matter is that the Ninth Circuit's *Continental Illinois National Bank* decision on the proper standard of judicial review for state legislative action impairing the contractual financial obligations of state political subdivisions follows inexorably from this Court's *United States Trust* decision, fairly and properly read; whereas the Second Circuit's decision in the instant case flies in the face of *United States Trust* and its teachings.

II.

The District Court and the Second Circuit both found that the state legislative action at issue in this case substantially impairs the contractual financial obligations of a state political subdivision. When the "reasonableness and necessity" of that impairment is judged under the *United States Trust* "careful scrutiny" standard of judicial review—as it

should be—the challenged legislative action plainly runs afoul of the Contract Clause.

United States Trust holds that "[t]he determination of necessity" of state contract impairment legislative action turns on whether the impairment was "essential" to accomplishing the "important purposes claimed by the State," or whether the State had "alternative means of achieving [its legislative] goals." 431 U.S. at 29-30.[7] It cannot be gainsaid that the contract impairment legislative action at issue here was *not* "essential," in that the State most assuredly *did* have "alternative means of its achieving [its legislative] goals."

New York's legislative goal in impairing the contractual financial obligations of the Buffalo School District (and of the City of Buffalo itself, *see supra* p. 4 n.2) was to provide a measure of financial relief to the City sufficient—in combination with the BFSA Act's various other provisions aimed at addressing the City's fiscal situation—to enable the City "to balance its budget." *Supra* p. 3.[8] But the State unquestionably could have provided that same measure of financial relief to the City—and thereby achieved that same legislative goal—through the alternative means of providing more state financial aid to the City.

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[7] With regard to "reasonableness," *United States Trust* holds that the proper focus is on whether the contract impairment is either "a reasonable means to restrict a party to those gains reasonably to be expected from the contract," or a reasonable means to meet unknown and unforeseen changes in circumstances that cause the contract "to have a substantially different [current] impact . . . than when it was adopted." *Supra* p. 12 n.5 (quoting 431 U.S. at 31-32). In this case, Respondents did not even claim that the contract impairment at issue was justified on either basis.

[8] One of those other BFSA Act provisions—which Petitioners have *not* challenged in this case—is a statutory prohibition on wage increases under *new* collective bargaining contracts, absent the Control Board's prior approval. *See* Pet. App. 68a-69a.

Importantly in this regard, the State never has claimed during the course of these proceedings—and could not plausibly do so—a financial inability to provide the City of Buffalo, through the direct appropriation of state financial aid, the amount that the State's impairment of the contractual financial obligations of the Buffalo School District (and of the City itself) has saved the City. *Compare Surrogates*, 940 F.2d at 772-74 (seeking to justify the State's contract impairment action as a "reasonable and necessary" response to a *state* fiscal crisis); *Condell*, 983 F.2d at 419-20 (same). That being so, the State's assertion throughout this case (accepted by the Second Circuit, *see supra* pp. 7-8) that its contract impairment legislative action was a "necessary" means of assisting a state political subdivision in financial distress cannot withstand the "careful scrutiny" mandated by *United States Trust*.[9]

To be sure, by proceeding as it did to choose contract impairment as the preferred policy alternative to providing more state financial aid to the City of Buffalo, the State of New York was able to achieve its legislative goal of enabling the City "to balance its budget" *at a substantially lower out-of-pocket cost to the State*. But a State's "self-interest" in saving itself money is not a sufficient justification under the Contract Clause for the impairment of public contracts. "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust*, 431 U.S. at 26.

In the foregoing regard, the Second Circuit's heavy reliance on the "undisputed facts" showing that *the City of*

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[9] Indeed, there is nothing in the record to indicate that it even would have been necessary for the State to raise its taxes or eliminate other state programs and services in order to provide this additional state aid to the City of Buffalo, *see* Pet. App. 15a—as opposed to simply using otherwise available state funds.

Buffalo did not have viable alternatives for addressing its fiscal crisis is entirely misplaced.[10] The City of Buffalo did *not* impair its own contractual financial obligations or those of the Buffalo School District; *the State of New York did.* And, the State took that contract impairment action so as to have "extra money" for what it regarded as other "important public purpose[s]," *United States Trust*, 431 U.S. at 26—rather than out of any "necessity" created by a *State* fiscal crisis. Thus, under the applicable *United States Trust* "careful scrutiny" standard of judicial review, that contract impairment action fails the Contract Clause test of "reasonableness and necessity."[11]

Indeed, any suggestion that the state contract impairment legislative action at issue in this case could survive under the

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[10] *E.g.* Pet. App. 13a-14a ("[T]he City had already taken other more drastic measures including school closings and layoffs; . . . [thus] the alternatives to the wage freeze consisted of elimination of more municipal jobs and school closures, alternatives which clearly are more drastic than a temporary wage freeze."); *id.* 15a ("[D]efendants have shown that Buffalo had already increased City taxes to meet its fiscal needs, and it is reasonable to believe that any additional increase would have further exacerbated Buffalo's financial condition.").

[11] Having said that, we would be derelict if we failed to note the Fourth Circuit's decision in the related, but decisively different, situation presented in *Baltimore Teachers Union, Am. Fed'n of Teachers Local 340 v. Mayor & City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993). There, the governmental entity that took the challenged contract impairment acion, the City of Baltimore, was itself suffering from a severe fiscal crisis. In that circumstance, the Fourth Circuit concluded that the City had no viable alternatives to its contract impairment action, and thus had a valid "necessity" justification for its action. *Id.* at 1020. (But see Judge Murnaghan's dissent from the denial of rehearing *en banc*, opining that even considering the City of Baltimore's dire financial situation, the City's contract impairment action "was by no means necessary" in Contract Clause terms, *id.* at 1027.) Here, as we have emphasized in text, the governmental entity that took the challenged contract impairment action, the State of New York, had no fiscal crisis of its own, and thus no colorable "necessity" justification for its action.

United States Trust "careful scrutiny" standard of judicial review is belied by *United States Trust* itself; by the Second Circuit's own decisions in *Surrogates* and *Condell*; and by an unbroken line of Ninth Circuit decisions beginning with *Continental Illinois National Bank, supra.* In that line of decisions, the Ninth Circuit repeatedly has struck down under the Contract Clause legislative action impairing the financial obligations of public contracts—observing in the most recent decision in that line that "[i]n the last thirty-five years, no Ninth Circuit . . . case has found a statute or ordinance necessary when the law in question altered a financial term of an agreement to which a state entity was a party." *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 897 (9th Cir. 2003); *see also University of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999); *Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223 (9th Cir. 1990).

And, this Court made an analogous point about its own Contract Clause decisions involving the impairment of public contracts in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), noting that "[i]n almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets," *id.* at 412 n.14.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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